Supreme Court, U.S.
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No. 05-67

In the
Supreme Court of the United States

ALLAN J. RITTENHOUSE,
Petitioner,

v.

SAUL EISEN, U.S. TRUSTEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are uncollected pre-petition attorney fees for debtors counsel discharged upon the debtor receiving their discharge?

PARTIES TO THE PROCEEDING

Petitioner is:
Allan J. Rittenhouse

Respondent is:
Saul Eisen

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Allan J. Rittenhouse., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinion of the Sixth Circuit (Pet. App. 1a–5a) is published at 404 F.3d 395. The opinion of the district court (Pet. App. 6a) is published at 287 B.R. 906, and the opinion of the bankruptcy court (Pet. App. 18a) is published at 292 B.R. 583. The Court of Appeals issued its opinion on April 7, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 329 of the Bankruptcy Code (11 U.S.C. § 329)

§ 329. Debtor's transactions with attorneys.

> (a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the sources of such compensation.
>
> (b) If such compensation exceeds the reasonable value of any such services, the court may cancel any

such agreement, or order the return of any such payment, to the extent excessive, to –

(1) the estate, if the property transferred-

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

Section 362 of the Bankruptcy Code (11 U.S.C. § 362)

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of –

* * *

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title. ...

Section 524 of the Bankruptcy Code (11 U.S.C. § 524)

§ 524. Effect of discharge.

(a) A discharge in a case under this title –

* * *

(2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived ...

Section 727 (11 U.S.C. § 727)

§ 727. Discharge.

(a) The court shall grant the debtor a discharge. ...

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter. ...

STATEMENT OF THE CASE

This case involves the relationship between bankruptcy debtors and their attorneys in chapter 7 cases. Section 329(a) requires a debtor's attorney to disclose compensation "paid or agreed to be paid ... for services rendered or to be rendered in contemplation of or in connection with" the bankruptcy case. 11 U.S.C. § 329(a). Section 329(b) requires the bankruptcy court to scrutinize those fees and agreements on a standard of reasonableness, and to cancel the agreement or require the return of payments to the extent excessive. 11 U.S.C. § 329(b). Thus, Congress explicitly recognized that there would be some cases in which debtors would have paid their attorneys before their petitions were filed, and there

would be other cases in which debtors would not have paid their attorneys but would have agreed to pay after their petitions were filed.

Bankruptcy Rule 1006, implementing 28 U.S.C. § 1930, provides for the payment of bankruptcy filing fees in installments within 120 days after the filing of a bankruptcy petition, but Rule 1006(b)(3) prohibits any payment to the debtors' attorney before the filing fee is paid in full. Fed R. Bankr. P. 1006(b). Rule 1006 codifies the longstanding practice under the former Bankruptcy Act and rules. *See, e.g. In re Latham*, 271 F. 538 (N.D.N.Y. 1921). These rules necessarily recognize that attorneys representing debtors in connection with their bankruptcies may be paid, and may agree to be paid, post-petition.

More than one million chapter 7 bankruptcies are filed in this country each year, most of them "no asset" consumer bankruptcies. In many cases, debtors pay fees and costs to their attorneys before filing, but in a substantial number of cases, the poorest of the poor pay fees and costs over time, after the filing of their petitions. Section 329 of the Bankruptcy Code expressly contemplates these arrangements, regulating debtor's attorney fees "paid or agreed to be paid ..., for services rendered or to be rendered in contemplation of or in connection with the case." 11 U.S.C. § 329(a). Nonetheless, the Sixth Circuit held in this case that postpetition payments of pre-petition fees to debtors' attorneys violates the discharge provisions of the Bankruptcy Code.

The Bankruptcy Code provides for liquidation in chapter 7, and for different categories of reorganization in chapters 9, 11, 12 and 13. Section 362 of the Code stays any act to collect a claim against the debtor that arose prior to the filing of a bankruptcy petition. 11 U.S.C. § 362(a)(6). Section 727

discharges the debtor from those same debts, and Section 524 enjoins any act to collect a discharged debt. 11 U.S.C. §§ 727(b), 524 (a)(2). These provisions are essential to relieve debtors of the financial pressures that drove them into bankruptcy, to allow a fair and orderly liquidation, and to afford a "fresh start" to honest but distressed debtors. House Report No. 595, 95th Cong., 1st Sess., 340, 384 (1977); Senate Report No. 989, 95th Cong., 2d Sess., 49, 98 (1978).

In order to obtain the benefits of the automatic stay and discharge provisions, a debtor must determine which chapter of the Code to proceed under, file a bankruptcy petition along with required schedules, attend a creditors meeting, respond to motions and adversary complaints, send appropriate notices, deal with creditors asserting security interests or requesting reaffirmation agreements, and establish eligibility for a discharge. Congress recognized that debtors would require the assistance of competent professionals to navigate the bankruptcy process successfully, and provided for the employment and compensation of professionals in chapter 3 of the Code governing case administration. See 11 U.S.C. §§ 327-331.

REASONS FOR GRANTING THE PETITION

1. The primary reason for granting the Petition is due to the significant importance to the public.

F. Bankr. Rule 1006, promulgated by the United States Supreme Court and approved by Congress, states:

Federal Rule of Bankruptcy Procedure-Rule 1006

(a) *General Requirement.* Every petition shall be accompanied by the filing fee except as provided in subdivision (b) of this rule. . .

(b) Payment of Filing Fee in Installments.

(1). *Application for Permission To Pay Filing Fee in Installments.* A voluntary petition by an individual shall be accepted for filing if accompanied by the debtor's signed application stating that the debtor is unable to pay the filing fee except in installments. The application shall state the purposed terms of the installment payments and that the applicant has neither paid any money nor transferred any property to an attorney for services in connection with the case.

(2). *Action on Application.* Prior to the meeting of creditors, the court may order the filing fee paid to the clerk or grant leave to pay in installments and fix the number, amount and dates of payment. The number of installments shall not exceed four, and the final installment shall be payable not later that 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided the last installment is paid not later than 180 days after filing the petition.

(3). *Postponement of Attorney Fees.* The filing fee must be paid in full before the debtor or chapter 13 trustee may pay an attorney or any other person who renders services to the debtor in connection with the case.

The Bankruptcy Rule makes sense only if the Code permits Chapter 7 debtors to make post-petition payments for pre-petition legal services. Congress permitted the poorest debtors to pay their filing fees in installments, but forbade

these same debtors from paying their attorneys to prepare the petitions would be utter nonsense and Congress provided for attorney fees in Section 329 of the Code, including fees paid and agreed to be paid for services rendered or to be rendered. "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *United States v. Ron Pair Enterprises, Inc.* 489 US 235 (1989) citing *Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982).* In such cases, the intention of the drafters, rather than the strict language, controls. *Ibid.* It is clear that allowing postpetition payments for pre-petition services does not contravene the intent of the framers of the Code. Allowing such payments does not conflict any important state or federal interest; nor is a contrary view suggested by the legislative history.

2. The second reason for granting the Petition is to resolve disagreements among lower courts about specific legal questions.

The dischargeability of debtors' attorneys fees is the subject of a widening conflict among the circuit courts of appeals. The Ninth Circuit has ruled that fees for prepetition work which remain unpaid at the filing of the petition are subject to the automatic stay and discharge provisions of the Bankruptcy Code, but fees for postpetition work are not stayed or discharged. *In re Hines*, 147 F.3d 1185 (9th Cir. 1998). Acknowledging that its opinion "creates a conflict with the ninth circuit's holding in *Hines,*" the Seventh Circuit has ruled that all fees not paid prior to the filing of the petition, for work done prepetition and postpetition, are stayed and discharged. *Bethea v. Robert J. Adams & Associates*, 352 F.3d 1125, 1129 (7th Cir. 2003).

The Ninth Circuit reaffirmed its position in *In re Sanchez*, 241 F.3d 1148 (9th Cir. 2001). The Second Circuit recently adopted the Ninth Circuit's position, referring to both *Bethea* and *Sanchez*. *In re Fickling*, 361 F.3d 172, (2d Cir. 3/3/04). Lower courts in two other circuits have addressed the issue, with mixed results. Two bankruptcy courts in the Sixth Circuit have held that prepetition fees are discharged, but not postpetition fees. *Rittenhouse v. Eisen*, 404 F3d 395. 6th Cir. 2005) ; *In re McNickle*, 274 B.R. 477 (Bankr. S.D. Ohio 2002). Three bankruptcy courts in the Tenth Circuit have taken three different positions. In *In re Martin*, 197 B.R. 120 (Bankr. D. Colo. 1996), the court held that prepetition fees were discharged in chapter 7 cases. In *In re Haynes*, 216 B.R. 440 (Bankr. D. Colo. 1997), the court held that prepetition fees were discharged in all bankruptcy cases, not just chapter 7 cases. In *In re Perry*, 225 B.R. 497 (Bankr. D. Colo. 1998), the court held that neither prepetition nor postpetition fees were discharged.

This split of authority concerning the obligations of court, counsel and debtors under the Bankruptcy Code is intolerable. The Bankruptcy Code is a federal statute of nationwide application, both comprehensive in scope and complex in its balancing of interests. The bankruptcy court in Michigan should not be enforcing a different Code than the bankruptcy courts in Los Angeles and Denver. Debtors should not be forbidden from entering into enforceable installment agreements with counsel in Michigan, permitted to do so in Denver, and both forbidden in part and permitted in part in Los Angeles. The ability of a debtor's attorney to collect a fee should not depend on the location of his or her practice.

The ability of debtors and their attorneys to enter into enforceable fee agreements is of vital importance to the administration of justice in the bankruptcy system. More than

one-and-a- half million bankruptcies were filed in the United States in 2002, more than one million of them filed under chapter 7. Administrative Office of the United States Courts, *2002 Annual Report of the Director: Judicial Business of the United States Courts* (U.S. Gov't. Printing Office, Washington, DC., 2003) pp. 26-28. While the number of bankruptcies increased 72% from 1992 to 2002, the number of bankruptcy judgeships has stayed the same, causing bankruptcy caseloads to nearly double. *Id.*, p. 28.

Recognizing that competent attorneys were essential to "enable the system to operate smoothly, efficiently and expeditiously," Congress set the standard for compensation at the reasonable value of services rendered so that competent counsel would be attracted to the bankruptcy field. House Report No. 595, 95th Cong., 1st Sess., 329-30 (1977); Senate Report No. 989, 95th Cong., 2d Sess., 41 (1978). The ability of debtors to pay their attorneys reasonable compensation takes on greater significance because it is now clear that attorneys for debtors may not be compensated from bankrupt estates, at least in chapter 7 proceedings. *Lamie v. United States Trustee*, 540 U.S. ___ (2004). The inability of debtors to make enforceable agreements for the reasonable compensation of counsel will burden the bankruptcy system by increasing the number of *pro se* filings, decreasing the number of competent attorneys attracted to the bankruptcy field, or both.

The ability of debtors to enter into enforceable agreements with their attorneys is also crucial to the right of chapter 7 debtors to have the aid and advice of counsel. The official House and Senate Reports on Section 329 of the Bankruptcy Code states that this section was "derived in large part from current Bankruptcy Act § 60(d)." House Report No. 595, 95th Cong., 1st Sess., 329 (1977); Senate Report No. 989, 95th

Cong., 2d Sess., 39 (1978). Nearly a century ago, this Court commented on the evident purpose of Section 60(d):

> It recognizes the temptation of a failing debtor to deal too liberally with his property in employing counsel to protect him in view of financial reverses and probable failure. It recognizes the right of such a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provision for reasonable compensation to his counsel. And, in view of the circumstances, the act makes provision that the bankruptcy court administering the estate may, if the trustee or any creditor questions the transaction, re-examine it with a view to a determination of its reasonableness.

In re Wood, 210 U.S. 246, 253 (1908) (emphasis added). Throughout the history of the old Act, courts continued to make the connection between the right to counsel in bankruptcy cases and the ability of debtors to make provision for the reasonable compensation of counsel. *See, e.g. Caldwell v. Valley National Bank*, 208 F.2d 645, 646 (10th Cir. 1953); *In re Falk*, 30 F.2d 607, 609 (2d Cir. 1929).

Where Congress intends for legislation to change a judicial interpretation, it clearly expresses that intention. *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 501 (1986) (commenting that this rule of statutory construction is followed with particular care in construing bankruptcy codifications). By enacting Section 329 of the Code, Congress carried forward the purpose of Section 60(d), to afford debtors the right to counsel by enabling them to make provision for the reasonable compensation of counsel. Only

this Court can resolve the conflict among the circuits on this issue of importance for the administration of the bankruptcy system and the breadth of debtors' right to counsel in bankruptcy cases.

Section 329 of the Code governs the fees of "[a]ny attorney representing a debtor in a case under [the Bankruptcy Code], or in connection with such a case." 11 U.S.C. § 329(a). Pursuant to Section 329, attorneys representing debtors must disclose the amount, source and terms of all "compensation paid or agreed to be paid ... for services rendered or to be rendered in contemplation of or in connection with the case." 11 U.S.C. § 329(a). Congress delegated the task of monitoring each debtor's attorneys fees to the bankruptcy court presiding over the case, and set the legal standard for those fees at "the reasonable value of any such services." 11 U.S.C. § 329(b).

Section 329 provides its own remedies for noncompliance or excessive fees. The bankruptcy court may cancel the agreement or order the return of the excess, either to the estate or to the one who paid. 11 U.S. C. § 329(b). Review of fees under Section 329 is *sui generis*, regulating the relationship between debtors and debtors' attorneys as officers of the court: The unique nature of Section 329 is highlighted by its inclusion with the Code provisions governing the employment and compensation of professionals. *In re Rheuban*, 128 B.R. 551, 558-60 (Bankr. C.D. Cal. 1991). Courts have an affirmative duty to review the reasonableness of fees disclosed. *In re Yermakov*, 718 F.2d 1465 (9th Cir. 1983).

Section 329 serves the same purpose as to debtors' attorneys fees that the automatic stay and discharge provisions serve as to general creditors. Congress recognized the need

to protect both creditors and debtors with respect to debtors' attorneys fees, and designed Section 329 specifically for that purpose. H.R. Rep. No. 595, 95th Cong., 1st Sess. 329 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 39 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5963, 6285, 5787, 5825. This case involves the fees of attorneys representing debtors in cases under the Bankruptcy Code. Congress specifically provided for court supervision of fees paid or agreed to be paid, for services rendered or to be rendered. Courts are required to apply a reasonable value standard to any such services, whether paid or agreed to be paid, whether rendered prepetition or postpetition. Section 329 clearly applies here.

"A general statutory rule usually does not govern unless there is no more specific rule." *Green v. Bock Laundry Machine Co.*, 490 U. S. 504, 524, (1989). The automatic stay and discharge provisions contain general rules of general applicability: Section 329 sets forth specific procedures and remedies that apply only to attorneys representing debtors in contemplation of or in connection with their bankruptcy cases. Section 329 specifically regulates the fees paid or agreed to be paid by these plaintiffs to these defendants.

b. Prior to the enactment of the Bankruptcy Code in 1978, debtors' attorneys fees were governed by two sections of the Bankruptcy Act of 1898, as amended. Fees paid prepetition were governed by Section 60(d), which avoided the preference rules of the old Act, and instead subjected those fees to court supervision on a standard of reasonableness. 11 U.S.C. § 96(d) (1978). By contrast, fees paid postpetition were governed by Section 64(b) of the Act, which provided for priority and payment from the estate. See 11 U.S.C. § 104(b) (1978).

In enacting Section 329 of the Bankruptcy Code of 1978, Congress consciously chose the approach of old Section 60(d), court supervision on a standard of reasonableness. The official House and Senate Reports on Section 329 state that this section was "derived in large part from current Bankruptcy Act § 60(d)." H.R. Rep. No. 595, 95th Cong., 1st Sess. 329 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 39 (1978), U.S. Code Cong. & Admin. News 1978, pp. 5963, 6285, 5787, 5825. Moreover, Congress explicitly broadened the scope of Section 329, extending the Section 60(d) approach to "agreements" as well as "payments," and to services rendered "in connection with" the bankruptcy as well as "in contemplation" of it. Compare 11 U.S.C. § 329 with 11 U.S.C. § 96(d) (1978).

For many years prior to the 1978 Code, courts recognized that Section 60(d) of the Act was designed as much to protect the debtor's right to counsel as it was to control the compensation of counsel. In the first decade of the Bankruptcy Act's operation, this Court commented on the evident purpose of the statute:

> It recognizes the right of such a debtor to have the aid and advice of counsel, and, in contemplation of bankruptcy proceedings which shall strip him of his property, to make provision for reasonable compensation to his counsel.

In re Wood, 210 U.S. 246, 253, (1908). The Court noted that Section 60(d) was *sui generis*, administrative in character, the subject of proceedings "both simple and summary," the attorney being "an officer of the court." 210 U.S. at 253, 257.

This view of Section 60(d) prevailed for more than three-quarters of a century under the old Act. *See, e.g., In re Falk*, 30 F.2d 607, 609 (2d Cir. 1929) ("The object of section 60(d) was to afford the bankrupt representation by counsel, who would not have to take his chances as a general creditor, but might know that a reasonable fee was assured"); *Caldwell v. Valley National Bank*, 208 F.2d 645, 646 (10th Cir. 1953) (Section 60(d) "recognizes the right of a debtor ... to have the aid, advice and assistance of counsel and to make provision for reasonable compensation to such counsel"). See also *In re Haynes*, 216 B.R. 440, 444 (Bankr. D. Colo. 1997) (commenting on the longstanding practice of not discharging prepetition fees in chapter 13 cases).

This widely accepted and longstanding interpretation of Section 60(d) formed the background against which Congress passed Section 329. "When Congress amends the bankruptcy laws, it does not write on a clean slate." *Dewsnup v. Timm*, 502 U.S. 410, 419, 112 S.Ct. 773, 779, 116 L.Ed.2d 903 (1992) (internal quotes omitted). The normal rule of statutory construction, that if Congress intends for legislation to change a judicial interpretation, it clearly expresses that intention, is followed with particular care in construing bankruptcy codifications. *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494, 501, 106 S. Ct. 755, 759, 88 L.Ed.2d 859 (1986). This Court "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 563, 110 S.Ct. 2126, 2133, 109 L.Ed.2d 588 (1990).

There is nothing in the Bankruptcy Code nor in its legislative history to indicate that Congress intended to narrow the right of debtors to the advice and assistance of

counsel in any way. There is nothing to indicate that Congress intended to diminish the ability of debtors to make provision for reasonable attorneys fees. To the contrary, Section 329 of the Code recognizes the right of debtors to the assistance of counsel, and protects that right by enabling debtors to make provision for the reasonable compensation of counsel. And Congress abolished the distinction between fees paid prepetition and fees paid postpetition, extending Section 329 to all fees of the debtor "paid or agreed to be paid." 11 U.S.C. § 329(a). The right to counsel in bankruptcy cases is the policy preference of Congress.

Congress designed Section 329 to afford debtors the right to counsel, carrying forward the "discrete, exclusive regulation" of fee agreements established by its statutory predecessor. *In re Bethea*, 275 B.R. 284, 293 (Bankr. N.D. Ill. 2002). The District Court agreed, noting that courts historically have recognized the qualitative distinction between debtors' attorneys and general creditors "because the agreement between a debtor and his counsel is fundamental to the success of the bankruptcy case itself." *Bethea v. Robert J. Adams & Assoc.*, 287 B.R. 906, 910-11 (N.D. Ill. 2003). The Debtor in this case exercised their right to counsel by hiring the Attorney to represent them in bankruptcy proceedings, and the Debtor made provision for reasonable compensation of counsel by agreeing to pay in installments. Neither the Debtors nor the Attorney violated the Bankruptcy Code by doing so.

c. The Supreme Court prescribes rules for practice and procedure in bankruptcy cases. 28 U.S.C. § 2075. In 1979, the Court formed an Advisory Committee on Bankruptcy Rules, consisting of judges, scholars and practitioners to draft a complete set of rules implementing the new Bankruptcy Code. This Court transmitted these rules to Congress, which

took no action to disapprove or amend, and the Bankruptcy Rules became effective August 1, 1983. 9 *Collier on Bankruptcy* (15th Ed. Rev. 2002) ¶ 1001.02[2]. The Bankruptcy Rules reveal a contemporaneous understanding that the Code permits postpetition payment for prepetition services.

Rules 2016 and 2017 implement Section 329 of the Code. See Fed. R. Bankr. P. 2016, 2017. Rule 2016(b) requires "[e]very attorney for a debtor" to file an initial statement of all compensation paid or agreed to be paid within 15 days of the filing of a bankruptcy petition, and further requires the attorney to file "a supplemental statement ... within 15 days after any payment or agreement not previously disclosed." Fed. R. Bankr. P. 2016(b). Rule 2017(a) provides for review of any payment by a debtor to an attorney before the filing of a petition, and Rule 2017(b) provides for the review of any payment "or any agreement therefor" after the filing of the petition. Fed R. Bankr. P. 2017.

Bankruptcy Rule 1006, implementing 28 U.S.C. § 1930, provides for the payment of bankruptcy filing fees in installments within 120 days after the filing of a bankruptcy petition, but Rule 1006(b)(3) prohibits any payment to the debtor's attorney before the filing fee is paid in full. Fed. R. Bankr. P. 1006(b). Rule 1006 codifies the longstanding practice under the former Bankruptcy Act and rules. *See, e.g., In re Latham*, 271 F. 538 (N.D.N.Y. 1921). These rules necessarily recognize that attorneys representing debtors in connection with their bankruptcies may be paid, and may agree to be paid, postpetition.

In the *Bethea* case, the Bankruptcy Court observed that Rule 2017(b) "would be nullified in Chapter 7 cases," and that Rule 1006(b) "makes no sense if the attorneys' fees

cannot be collected postpetition." *In re Bethea*, 275 B.R. at 289, 295. While it is true that the Bankruptcy Rules may not abridge substantive provisions of the Code, 28 U.S.C. § 2075, it is equally true that rules propounded by the Supreme Court and approved by Congress are presumed not to abridge those provisions. *In re Moralez*, 618 F.2d 76, 78 (9th Cir. 1980) (resolving doubt about prior substantive law in favor of the understanding expressed by rule); *Matter of Decker*, 595 F.2d 185, 189 (3d Cir. 1979) ("strong presumption" in favor of consistency of rules with Code). The Bankruptcy Rules make sense only if the Code permits Chapter 7 debtors to make postpetition payments for prepetition legal services.

According to the plain meaning of Section 329, Congress had no such artificial and problematic agreements in mind. Section 329 begins, "Any attorney representing a debtor in a case ... shall file with the court a statement of compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of filing of the petition. ..." 11 U.S.C. § 329(a). Thus, Congress explicitly contemplated one attorney in one case with one agreement, including fees paid or agreed to be paid. Section 329 goes on to provide for the cancellation of the agreement or the return of any payment, if "such compensation exceeds the reasonable value of any such services." 11 U.S.C. § 329(b). Again, Congress treated the compensation of the attorney and the reasonable value of services as a whole, not as separate pieces.

Bankruptcy Judge William Hillman advises debtors "Yes, you do need a lawyer in a bankruptcy case." Hillman, *Personal Bankruptcy: What Every Debtor and Creditor Needs to Know* (2d Ed. 1995), p. 23. Judge Hillman explains:

> The bankruptcy laws can be extraordinarily complicated. Many mistakes people make by trying to do it on their own often cannot be corrected later. Even the simplest choices involve uncertainties and risks if you are not thoroughly familiar with the law.

Id., p. 20. The need for a lawyer is clear: that is what led these Debtors to hire the Law Firms in their bankruptcy cases.

Congress intended Section 329 to enable debtors to hire competent attorneys because debtors need attorneys to obtain the benefits of bankruptcy relief, and because the bankruptcy system needs competent attorneys representing debtors in order to function. Allowing for reasonable compensation is not a species of "social class" preference, it is the method enacted by Congress in Section 329 to promote public policies chosen by Congress.

CONCLUSION

Is there is an "**unwritten**" exception to the discharge for attorney fees earned prepetition, but not collected. ***11 U.S.C. §523(a) sets forth eighteen exceptions to the discharge granted under §727. Unpaid attorney fees earned prior to the filing of the petition are not among them***. Yet, unwritten exceptions have developed, by way of legal fictions, throughout our legal heritage. There is the doctrine of discovery, relation back, equitable estoppel, promissary estoppel, equitable subrogation and quantum meruit to name a few, all have developed to prevent injustice in equity. For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

Allan J. Rittenhouse

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-1281

[Filed April 7, 2005]

ALLAN J. RITTENHOUSE,)
Plaintiff-Appellant,)
)
v.)
)
SAUL EISEN, U.S. Trustee,)
Defendant-Appellee.)

OPINION

DUPLANTIER, District Judge. Sarah L. Chandlier failed to pay the sum of $800 which she had agreed to pay to an attorney for legal services performed in preparation for the filing of a Chapter 7 bankruptcy (11 U.S.C. § 701 et seq.), creating an account receivable owed to the attorney. Appellant Allen Rittenhouse purchased that account receivable from the attorney who filed the petition for bankruptcy and sought to collect the debt from Chandlier.

On motion of the U.S. Trustee, the bankruptcy court entered an order barring Rittenhouse from collecting "postpetition any unpaid fees for prepetition bankruptcy

counseling services . . . ." The bankruptcy court concluded that the unpaid pre-petition attorney fees were discharged by the bankruptcy judgment. Rittenhouse appealed that order to the district court, which affirmed the order. Rittenhouse appeals the order of the district court.

This appeal presents only an issue of law concerning the interpretation of 11 U.S.C. § 523. Therefore, we review the decision of the district court *de novo*. *In Re Sorah*, 163 F.3d 397, 400 (6th Cir. 1998). The issue of whether pre-petition attorney fees are dischargeable in bankruptcy is *res nova* in this circuit. We join three other circuits[1] in concluding that pre-petition attorney fees are dischargeable, and we affirm the order of the district court.

11 U.S.C. § 727(b) provides that a discharge under Chapter 7 relieves a debtor of all debts incurred prior to the filing of a petition for bankruptcy, except those nineteen categories of debts specifically enumerated in 11 U.S.C. § 523(a). A debt for pre-petition legal services is not one of the non-dischargeable debts enumerated in § 523(a).

Appellant contends that unless pre-petition debts for legal services are held to be non-dischargeable, the provisions of 11 U.S.C. § 329, governing attorney fees, will conflict with the general discharge provisions of § 727(b) and that § 329 is meaningless with respect to Chapter 7 bankruptcies unless pre-petition attorney fees are non-dischargeable.

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[1] *In re Fickling*, 361 F.3d 172 (2nd Cir. 2004); *Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125 (7th Cir. 2003); and *Hessinger & Assocs. v. United States Trustee (In re Biggar)*, 110 F.3d 685 (9th Cir. 1997).

Section 329 - which applies to Chapter 7 bankruptcies as well as other types of bankruptcies - requires that a debtor's attorney disclose to the court the amount of attorney fees "paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition. . . ." 11 U.S.C. § 329(a) (2000). That section also requires the bankruptcy court to evaluate the reasonableness of the fee arrangement. We reject appellant's contention that if pre-petition attorney fees are dischargeable § 329 is meaningless; "§ 329 has *plenty* to do in Chapter 7 cases, even if debts for legal fees are subject to discharge." *Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125, 1127 (7th Cir. 2003). For example, the judge must ensure reasonableness by recouping prepaid fees which exceed the reasonable value of the legal services. *Id.* Also, the judge must determine the reasonableness of reaffirmed debts for attorney fees. *Id.* Moreover, § 329 covers also post-petition attorney fees, which are not dischargeable. Thus, contrary to appellant's contention, § 329 is meaningful without a judicial addition of pre-petition attorney fees to the nineteen non-dischargeable exceptions listed in § 523(b). We apply the clear language of the bankruptcy statute in affirming the judgment of the district court.

Appellant asserts that if debts created by pre-petition agreements to pay attorney fees are not discharged, the benefits of bankruptcy will not be available to those who need it most, i.e., those who are unable to pay attorney fees in advance of filing.[2] Appellant argues that in order to pay an attorney, the potential bankrupt would have to unjustly withhold payments due to suppliers of necessities, such as

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[2] The U.S. trustee responds that the multitude of yearly Chapter 7 filings proves the contrary.

public utilities, to the detriment of the general public. Although that argument may have merit, it raises a policy question which is properly addressed to Congress, not to the court. "The judiciary's job is to enforce the law Congress enacted, not to write a different one that judges think superior." *Id.* at 1128.

For the foregoing reasons, we affirm the order of the district court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 04-1281

[Filed April 7, 2005]

ALLAN J. RITTENHOUSE, Plaintiff-Appellant,	)
v.	)
SAUL EISEN, U.S. Trustee, Defendant-Appellee.	)

JUDGMENT

On Appeal from the United States District Court for the Western District of Michigan at Marquette.

THIS CAUSE Was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

File No. 2:03-CV-160
(Bkrp. No. SM00-90786)

[Filed February 11, 2004]

ALLAN J. RITTENHOUSE, Appellant,	)
v.	)
SAUL EISEN, United States Trustee, et al., Appellees.	)

OPINION

HON. ROBERT HOLMES BELL

Appellant Allan J. Rittenhouse appeal from the June 16, 2003, Order of the Bankruptcy Court prohibiting Appellant from collecting post-petition any unpaid fees for pre-petition bankruptcy counseling services. For the reasons that follow the order will be affirmed.

I.

This appeal arises out of the voluntary petition for Chapter 7 bankruptcy filed by Debtor Sara L. Chandlier. On May 3, 2001, the bankruptcy court entered an order granting the debtor a discharge under 11 U.S.C. § 727. Appellant sent Ms. Chandlier a letter dated November 19, 2002, demanding that she pay the debt she owed for the bankruptcy he filed on her behalf. Together with the letter Appellant sent a proposed complaint alleging that Ms. Chandlier had failed to pay the $800 she had agreed to pay him for filing a bankruptcy petition.[1] On December 17, 2002, the United States Trustee filed a motion requesting review and disgorgement of attorney compensation under 11 U.S.C. § 329(b) and Rule 2017, and sanctions under 11 U.S.C. § 362. On April 16, 2003, the bankruptcy court granted the Trustee's motion. The bankruptcy court held that the debtor's pre-petition obligation to pay the attorney fee had been discharged under § 727 of the Bankruptcy Code. On June 16, 2003, the bankruptcy court

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[1] The bankruptcy was filed while Mr. Rittenhouse was suspended from practicing in the bankruptcy court for the Western District of Michigan. Mr. Pepin's name is listed on the bankruptcy petition as the debtor's attorney. Mr. Rittenhouse advised Ms. Chandlier in his letter of November 19, 2002, that she owed him a debt for the bankruptcy he filed on her behalf. Mr. Rittenhouse now explains that he purchased the Chandlier account receivable from Mr. Pepin. Although these circumstances raise a question of fact as to whether the Appellant was in privity with the debtor, the bankruptcy court determined that the privity issue was mooted by the bankruptcy court's determination that in any event the pre-petition Chapter 7 fees were discharged by the bankruptcy. This Court agrees with the bankruptcy court that resolution of the privity issue is not necessary for purposes of this appeal.

entered a final order which incorporated its April 16, 2003, ruling that "Allan J. Rittenhouse shall not collect postpetition any unpaid fees for prepetition bankruptcy counseling services." This appeal followed.

II.

We review a bankruptcy court's findings of fact for clear error and its conclusions of law de novo. *WesBanco Bank Barnesville v. Rafoth (In re Baker & Getty Fin. Servs.)*, 106 F.3d 1255, 1259 (6th Cir. 1997); Bankruptcy Rule 8013. The sole issue on appeal is whether a debtor's pre-petition debt for attorney fees is discharged in bankruptcy. "Whether a pre-petition installment contract for legal services rendered in contemplation of bankruptcy is discharged presents a question of law reviewed de novo." *Hessinger & Assocs. v. United States Trustee (In re Biggar)*, 110 F.3d 685,687 (9th Cir. 1997).

III.

The bankruptcy court determined that a pre-petition agreement to pay attorney fees was a pre-petition debt that was discharged under the Bankruptcy Code's discharge provision which states in pertinent part:

> Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter ....

11 U.S.C. § 727(b). Many exceptions to the discharge are listed in 11 U.S.C. § 523(a), but, as the bankruptcy court noted, "[u]npaid attorney fees earned prior to the filing of the petition are not among them." (4/16/03 Op. at 5).

The issue of the dischargeability of pre-petition debts for attorney fees has not been decided by the Sixth Circuit or the Supreme Court. The bankruptcy court's reasoning, however, is consistent with the majority of the cases that have considered this issue. *See, e.g., Hessinger andAssoc, v. U.S. Trustee (In re Biggar)*, 110 F.3d 685,688 (9th Cir. 1997) ("[W]e hold that the debts at issue in this case - debts arising from the provision of pre-petition legal services - are dischargeable in a bankruptcy proceeding."); *In re Nieves*, 246 B.R. 866 (E.D. Wis. 2000) (aligning itself with the majority view that a Chapter 7 discharge covers attorney's fees owed by a debtor for services involved in the preparation for filing the bankruptcy case); *In re Jastrem*, 224 B.R. 125,129 (Bankr. E.D. Calif. 1998) ("a fee for services rendered pre-petition is a claim subject to discharge"); *In re Martin*, 197 B.R. 120 (Bankr. D. Colo. 1996) (agreeing with the majority that an unpaid debt arising from a pre-petition attorney fee agreement is dischargeable); *In re Hessinger & Assoc.*, 192 B.R. 211,217-18 (N.D. Cal. 1996) (holding that pre-petition retainer contracts are discharged) ; *Hessinger* and *Assoc. v. Voglio (In re Voglio)*, 191 B.R. 420, 421-22 (D. Ariz. 1996) (holding that a pre-petition agreement for post-petition payment of attorney's fees in a Chapter 7 bankruptcy proceeding are legally dischargeable); *In re Symes*, 174 B.R. 114, 119 (Bankr. D. Ariz. 1994) (holding that prebankruptcy fee agreements are dischargeable).

In support of his claim that a pre-petition agreement to pay attorney fees post-petition is not discharged, Appellant contends that pre-petition agreements to pay attorney fees are governed by 11 U.S.C. § 329, as implemented by Rules 2016 and 2017, rather than by the automatic stay and discharge provisions of the Bankruptcy Code. Section 329 governs the attorney fees paid or agreed to be paid by debtors for services rendered or to be rendered in contemplation of or in

connection with their bankruptcies.[2] Appellant refers the Court to the opinions in In re Bethea, 275 B.R. 284 (Bankr. N.D. Ill. 2002), affd, 287 B.R. 906 (N.D. Ill. 2003), and *In re Mills*, 170 B.R. 404 (Bankr. D. Ariz. 1994). Although Appellant acknowledges that these cases represent the minority view, he contends that they represent the better reasoned approach. In *In re Bethea*, the bankruptcy court reasoned that a literal application of the automatic stay and discharge provisions would conflict with the disclosure provisions of § 329. 275 B.R. at 292. In order to harmonize this apparent conflict the court reasoned that the more specific attorney compensation disclosure provisions of § 329 should supersede the more general reach of the discharge provisions of § 727. *Id.* at 294. The bankruptcy court opined that to do otherwise would be to render § 329(b) meaningless and would hinder the poorest debtors' ability to obtain legal assistance in filing for bankruptcy. *Id.* at 291-92. The bankruptcy court determined that neither of these outcomes could be consistent with Congressional intent, and accordingly held that a pre-petition retainer agreement with bankruptcy counsel was not discharged under 11 U.S.C. § 727 if it was "reasonable" under 11 U.S.C. § 329(b). *Id.* at 295. The district court

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[2] 11 U.S.C. § 329(a) provides that any attorney representing a debtor must file a statement of compensation paid or agreed to be paid. Subsection (b) provides that the bankruptcy court must determine the reasonableness of the services:

> (b) If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment ....

11 U.S.C. § 329(b).

agreed with the reasoning of the bankruptcy court. *In re Bethea*, 287 B.R. at 909.

Subsequent to the filing of the briefs on this appeal, the Seventh Circuit vacated and remanded the primary case on which Appellant relies. *See Bethea v. Robert J. Adams & Assocs.*, 352 F.3d 1125 (7th Cir. 2003) (Easterbrook, J.). The majority held that the structure of the Bankruptcy Code does not support treating § 329 as an implicit exception to § 727. *Id.* at 1127. "We therefore agree with *In re Biggar*, 110 F.3d 685 (9th Cir. 1997), that pre-petition debts for legal fees are subject to discharge under § 727." *Bethea*, 352 F.3d at 1127. The minority opinion which concurred in part agreed with the majority on the central issue, that "there is no conflict clear enough to defeat discharge, when attorneys' charges are not among the items specifically excepted from discharge by § 523." *Id.* at 1129 (Cudahy, J., concurring).

In re Mills, 170 B.R. 404, has been implicitly overruled by *Biggar*, 110 F.3d 685.[3] In light of the Seventh Circuit's vacation of the district court opinion in *Bethea*, the only viable case espousing the minority view is *In re Perry*, 225 B.R. 497 (Bankr. D. Colo. 1998).

Upon *de novo* review this Court concludes that the bankruptcy court correctly chose to follow the majority view and correctly determined that the pre-petition debt for attorney fees was discharged.

As a general rule, exceptions to discharge are narrowly construed to promote the central purpose of the discharge:

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[3] This implicit overruling was recognized by the bankruptcy court in *In re Bethea*, 275 B.R. at 286.

relief for the "honest but unfortunate debtor." *In re Meyers*, 196 F.3d 622,624 (6th Cir. 1999) (quoting *Grogan v. Garner*, 498 U.S. 279, 286-87 (1991)). *See also In re Juzwiak*, 89 F.3d 424,427 (7th Cir. 1996) ("Consistent with the 'fresh start' policy underlying the Code, these exceptions to discharge should be construed strictly against the creditor and liberally in favor of the debtor."). The creditor bears the burden of proving by a preponderance of the evidence that a debt is excepted from discharge under section 523(a) of the Bankruptcy Code. *In re Meyers*, 196 F.3d at 624.

Appellant has not attempted to show that the debt was excepted from discharge under section 523(a). Rather, his argument is that attorney fees are governed by § 329 and are therefore impliedly exempt from discharge. This Court is not convinced by this argument. Appellant has failed to present a convincing argument that there is a conflict between the disclosure provisions of § 329 and the discharge provisions of §727 that would justify ignoring the plain language of the Bankruptcy Code. The Seventh and Ninth Circuits have persuasively shown that § 329 is not in conflict with the discharge provisions of § 727. Section 329 is not rendered meaningless in a Chapter 7 proceeding if pre-petition fee agreements are discharged. The "reasonableness" inquiry under § 329 is not solely for the purpose of determining fees that must be paid by the debtor. It serves other functions. As the Seventh Circuit noted in *Bethea*:

> § 329 has plenty to do in Chapter 7 cases, even if debts for legal fees are subject to discharge. First, prepaid fees exceeding the "reasonable" value of the legal services must be recouped for the benefit of other creditors. Second, the judge must ensure the reasonableness of any fees incurred during the proceeding itself, once more to protect other creditors.

> Third, if the debt is reaffirmed during the proceeding, yet again the judge must ensure reasonableness. Finally, if the debtor repudiates the executory portion of the agreement with counsel, and the estate rehires the same lawyer (an approach that gives administrative priority to ongoing legal fees), once again § 329(b) requires the judge to review the fee agreement for reasonableness.

352 F.3d at 1127. "Because grouping legal fees with other debts subject to discharge does not gut § 329(b) for Chapter 7 cases, the structure of the Bankruptcy Code does not support treating § 329 as an implicit exception to § 727." *Id.* *See also In re Biggar*, 110 F.3d at 688 ("Because the disclosure and discharge provisions can coexist, the plain language of § 523 must be given effect."). The Colorado bankruptcy court explained that there is no conflict between § 329 and § 727 because the two provisions serve different purposes:

> Section 329 regulates transactions between the debtor's attorney and the debtor in all cases under the Code. Its purpose is to prevent the overreaching of debtor's attorney in the bankruptcy process. It does not speak to the effect of a discharge upon a debtor's pre-petition obligation to the attorney. In contrast, § 727 creates and defines the substantive rights of discharge. It addresses the fundamental goals of bankruptcy, a fresh start for the debtor and equal treatment of creditors. Had Congress intended to create an exception to discharge for unpaid attorney fees presumably it would appear in § 523.

In re Martin, 197 B.R. at 127. *See also In re Hessinger & Assoc.*, 192 B.R. at 217 ("The problem with appellant's

argument is that it hinges on the conclusion that § 329 is in intolerable tension with §§ 727 and 523. This simply is not so; § 329 does not purport to address dischargeability, but rather deals only with court oversight of attorney fees."). The bankruptcy court was not unsympathetic to Appellant's argument that discharge of installment fee agreements may prevent indigent debtors from obtaining counsel. The bankruptcy court properly noted however, that "[p]ublic policy concerns cannot trump the plain language of the bankruptcy code." (4/16/03 Op. at 6) (quoting *In re Biggar*, 185 B.R. at 829). As noted by the Ninth Circuit, the policy argument that fee arrangements calling for post-petition payments allows debtors who otherwise would have to proceed pro se, to obtain the assistance of counsel, is for Congress. *In re Biggar*, 110 F.3d at 688. The Seventh Circuit is in agreement:

> The three lawyers contend that reading § 727 this way would force the most destitute of debtors to forego legal assistance: because counsel neither could be paid in advance (the norm for Chapter 7 cases) nor could collect after the case ends. The bar therefore would shun these debtors, depriving them of the Code's benefits. That argument about what makes for good public policy should be directed to Congress; the judiciary's job is to enforce the law Congress enacted, not write a different one that judges think superior.

Bethea, 352 F.3d at 1127-28.

The bankruptcy court noted in this case that this issue rarely arises in this district, and that there are several creative solutions to assist debtors who have difficulty raising funds for legal representation prior to a bankruptcy filing. "Because this is only the second time this issue has arisen before this

Court, we assume that most bankruptcy practitioners know of these solutions and use them in one form or another." (4/16/03 Op. at 6) (footnote omitted).

Appellant has failed to convince this Court that there is any ambiguity or conflict in the Bankruptcy Code that would prevent pre-petition attorney fee agreements from being discharged under § 727. Accordingly, we affirm the June 16, 2003, order of the bankruptcy court.

Date:
February 11, 2004

/s/Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

File No. 2:03-CV-160
(Bkrp. No. SM00-90786)

[February 11, 2004]

ALLAN J. RITTENHOUSE, Appellant,	)
v.	)
SAUL EISEN, United States Trustee, et al., Appellees.	)

ORDER

HON. ROBERT HOLMES BELL

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that the United States Bankruptcy Court's order of June 16, 2003, is AFFIRMED.

Date: February 11, 2004

/s/Robert Holmes Bell
ROBERT HOLMES BELL
CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Case No. SM00-90786

In re Sara L. Chandlier,)
Debtor.)
)

FINAL ORDER PURSUANT TO THE OPINION AND ORDER OF APRIL 16, 2003

Hon. Jo Ann C. Stevenson

On April 16, 2003 the Court entered an opinion and order holding that Allan J. Rittenhouse, Esq., may not postpetition collect prepetition attorney fees on accounts receivable purchased from Michael Pepin, Esq. That order set a hearing for May 16, 2003 to determine whether further sanctions should be imposed. On April 21, 2003 Mr. Rittenhouse filed an appeal of the opinion of April 16, 2003 and a motion for stay of the opinion and order of April 16, 2003 pending appeal. The motion for stay pending appeal was set for hearing on June 16, 2003. The United States Trustee filed an Objection to the stay pending appeal. On May 16, 2003 the Court held a combined hearing on the motion for a stay pending appeal and the determination of sanctions. Mr. Ritterthouse appeared on May 16, 2003, representing himself; Michael V. Maggio, Esq., appeared for the United States Trustee. Upon the record, the parties agreed to the entry of a

sanctions order which would prohibit Mr. Rittenhouse from Collecting postpetition any unpaid fees for services performed prepetition fromany person, until and unless the opinion and order are reversed by a final, non-appealable order upon appeal or upon further order of this Court. This resolution obviated the request for a Stay pending appeal, which request the Court has therefore denied as moot by a Separate order. Therefore, for the reasons stated upon the record,

IT IS ORDERED THAT:

1. From this date, Allan J. Rittenhouse shall not collect postpetition any unpaid fees for prepetition bankruptcy counseling services owed by any person to Allan J. Rittenhouse; including but not limited to those accounts receivable that Allan J. Rittenhouse acquired from Michael Pepin, Esq., and also including but not limited to all clients of Allan J. Rittentiouse in his own right, until and unless the Court's opinion and order of April 16, 2003 are reversed by a final, non-appealable order upon appeal, or further order of this Court.

2. This order incorporates the opinion and order of April 16, 2003, completes the opinion and order of April 16, 2003 and constitutes a final order for purposes of appeal, if any party desires to take such an appeal.

3. The Clerk shall return an attested copy of this order to the United States Trustee, who shall serve copies upon Allan J. Rittenhouse, Esq.; Darrell Dettmann, Esq.; and Ms. Sara Chandlier.

Date: June 16, 2003

/s/ Jo Ann C. Stevenson
Honorable Jo Ann C. Stevenson
United States Bankruptcy Judge

Order Prepared By:
Michael V. Maggio
Trial Attorney
Office of the U.S. Trustee
330 Ionia NW, Suite 202
Grand Rapids, Michigan 49503
Tel: (616) 456-2002, ext. 14

APPENDIX E

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Case No. SM00-90786

In re Sara L. Chandlier,)
Debtor.)
)

ORDER

At a session of said Court, held in and for said District, at the United States Bankruptcy Court, Federal Building, Grand Rapids, Michigan this 16 day of April, 2003.

PRESENT: HONORABLE JO ANN C. STEVENSON
United States Bankruptcy Judge

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. In accordance with the attached Opinion, Debtor's Counsel shall cease all collection efforts on accounts receivable purchased from Michael Pepin for any pre-petition fees incurred prior to a Chapter 7 filing;

2. A hearing shall be held on May 16, 2003 at 9:30 a.m. attended byMr. Rittenhouse and the U.S. Trustee to

determine any sanctions that may be imposed upon Mr. Rittenhouse.

3. A copy of this Opinion and Order shall be served by first-class United States mail, postage prepaid upon Allan J. Rittenhouse, Esq. and Michael V. Maggio, Esq., U.S. Trustee.

Dated: April 16, 2003

/s/ Jo Ann Stevenson
Honorable Jo Ann C. Stevenson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

Case No. SM00-90786

In re Sara L. Chandlier,)
Debtor.)
)

OPINION

This matter comes before the Court on the United States Trustee's Motion Requesting Review and Disgorgement of Attorney Compensation Under] 1 U.S.C. § 329(b) and Rule 2017 and Sanctions Under 11 U.S.C. § 362. The Court bases its decision on the briefs filed by both parties and the cases cited therein, as well as oral arguments.

On April 17, 2000, the Honorable James D. Gregg, issued an Opinion and Order in the case of *In re Desilets*, 247 BR. 660 (Bankr. W.D. Mich. 2000) holding that Allan J. Rittenhouse was not an attorney authorized to practice law in Michigan and by extension was not authorized to practice bankruptcy law in the United States Bankruptcy Court for the Western District of Michigan. Sanctions against Mr. Rittenhouse were to be determined at a later *en banc* hearing. Mr. Rittenhouse appealed this decision but did not obtain a stay pending appeal.

The *en banc* hearing took place on August 23, 2000, during which Mr. Rittenhouse stipulated to the entry of an Injunction Order prohibiting him from practicing law in the Bankruptcy Court for the Western District of Michigan until further order of the Court. The Injunction Order was entered on September 26, 2000.

While his appeal was pending, Mr. Rittenhouse and another attorney, Michael Pepin, made the following arrangement: Mr. Pepin would become the attorney of record while Mr. Rittenhouse would work as his paralegal; Mr. Pepin would become Mr. Rittenhouse's tenant; and in exchange for $500 per week, Mr. Pepin would sell to Mr. Rittenhouse any accounts receivable generated by Mr. Rittenhouse's advertisements, while at the same time, Mr. Pepin would retain his own clients obtained through his own advertising.

On November 6, 2000, Mr. Pepin filed a bankruptcy petition for Sara Chandlier listing himself as attorney for the Debtor. He also executed two reaffirmation agreements on her behalf.

The Chandlier 341 meeting was scheduled to be held on December 7, 2000. Mr. Pepin did not appear. Consequently, the Chapter 7 Trustee, Darrell Dettman, adjourned the hearing to December 21, 2000. The hearing took place on that date but again, without the presence of Mr. Pepin.

On June 3, 2002, the Sixth Circuit Court of Appeals reversed Judge Gregg's Opinion and in response, the Bankruptcy Court dissolved the Injunction against Mr. Rittenhouse with an Order entered on September 20, 2002. Two months later, Mr. Rittenhouse wrote Ms. Chandlier a letter requesting $800 in legal fees stating that he was the attorney in her Chapter 7 case. On December 17, 2002, the U.S. Trustee filed the current Motion under consideration to prohibit Mr. Rittenhouse from collecting this fee.

The U.S. Trustee contends that in order for Mr. Rittenhouse to prevail he must first show privity with the Debtor. In other words, he must prove that either he was her

attorney or he bought the account receivable. Second, and perhaps more important, the U.S. Trustee asserts that the pre-petition attorney fees were discharged with the filing of the Chapter 7 petition and although there is a split in authority, the majority of cases agree. Should the Court find that the Chapter 7 fees were discharged, the privity issue becomes moot.

In addition to summoning the Doctrines of Laches and Necessity, Mr. Rittenhouse contends that an Order entered in *In re Melanie Syriala-Mattila*, Case No. 99-905 I3 allows him to collect fees in the present case because the Syrjala-Mattila Order states that he shall refrain from collection efforts until such time that he prevails on his appeal in the Desilets case. Mr. Rittenhouse also argues that Fed. R. Bankr. P. 1006 states a clear intent by Congress to help debtors by allowing the filing fee to be paid in installments and subordinating the payment of attorney fees until the filing fee has been paid in full. Therefore, Mr. Rittenhouse further argues, all attorney fees earned prior to the 120 day period allowed for installment payments within B.R. 1006 would be considered pre-petition and discharged. Congress, Mr. Rittenhouse contends, surely did not expect this result. He therefore urges the Court to look to the provisions &the entire law, its object and policy.

Mr. Rittenhouse asks the Court to adopt the minority view as espoused in *Bethea v. Adams (In re Bethea)*, 275 B.R. 284 (Bankr. N.D. Ill. 2002); *In re Perry*, 225 B.R. 497 (Bankr. D. Colo. 1998); and *In re Mills*, 170 B.R. 404 (Bankr. D. Ariz. 1994). These courts see a conflict between §727 and §523 on the one hand and Fed. R. Bankr. P. 2016 and 201.7 and 11 U.S.C. § 329 on the other.

11 U.S.C. § 329(b) requires a debtor's attorney to file "a statement &the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date &filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source &such compensation." The Bethea court reasoned that through this Code section, Congress explicitly contemplated that there will be some instances in which the debtor will have already paid all the fees before the case is commenced and the remedy for excessive fees payable in the future would be unnecessary if their collection is subject to the automatic stay and permanently extinguished by the discharge, *Id.* at 289.

Fed. R.. Bankr. P. 2016 and 2017 implement § 329. Rule 2016(a) regulates applications by professionals, including attorneys, for compensation from the estate. It requires counsel for the debtor to file a disclosure statement identifying fee arrangements and the amount of compensation paid or agreed to be paid by the debtor. Fed. R. Bankr. P. 201.6(b). Rule 2017 delineates the procedure by which payments to debtor's counsel are reviewed under § 329.

In *Perry*, 225 B.R. at 500, the court found "that Congress, by enacting Section 329 and adopting Rules 2016 and 2017, clearly contemplated the existence of fees 'agreed to be paid.., for services rendered or to be rendered' in contemplation of and in connection with a bankruptcy case." By legislating a method of disclosure of attorney fees and providing a method to regulate these fees to protect vulnerable debtors, the court assumed that Congress intended to create an exception to discharge for pre-petition attorney fees.

We find however, that the language of §329 merely requires that fees paid or agreed to be paid be fully reported.

It does not mean that all fees reported are allowed, simply that the court has the power to scrutinize these fees. In addition, §329 applies to all Chapters in the Bankruptcy Code, not just Chapter 7. Certainly in Chapters 11 and 13 and to a lesser extent in Chapter 7, there will be ongoing fee petitions that need to be reviewed. Section 329 simply gives the court authority to do this.

Bethea also discusses the impact of Fed. R. Bankr. P. 1006(b)(3) which provides:

> Postponement of Attorney's Fees. The filing fee must be paid in full before the debtor or chapter 13 trustee may pay an attorney or any other person who renders services to the debtor in connection with the case.

"Nobody could seriously argue that Congress intended to make it impossible for chapter 7 debtors, but not debtors under the other relief chapters, to enter into agreements with their bankruptcy attorneys providing for payment after the commencement of the case." *Id.* at 295.

To the contrary, we find there is no language in this statute which creates an exception to discharge, It is outside the ambit of this Court to legislate a new exception especially when based on the tenuous interpretation of a statute that involves the allowance of payment of filing fees in installments to say it also means that pre-petition attorney fees are not extinguished by the discharge. 11 U.S.C. §727(b) states in pertinent part:

> Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter..,

11 U.S.C. §523(a) sets forth eighteen exceptions to the discharge granted under § 727. Unpaid attorney fees earned prior to the filing of the petition are not among them.

Consequently, we are more inclined to follow the reasoning of the majority view, that being, had Congress intended to create an exception to discharge for unpaid pre-petition attorney fees it would appear in §523. In re Martin, 197 B.R. 120 (Bankr. D. Colo. 1996); *Hessinger and Associates v. Voglio (In re Voglio)*, 191 B.R. 420 (D. Ariz. 1996); *In re Nieves*, 246 B.R. 866 (Bankr. E.D. Wis. 2000); *In re Toms*, 229 B.R. 646 (Bankr. E.D. Pa. 1999); *In re Jastrem*, 224 B.R. 1.25 (Bankr. E.D.Calif. 1998). "Public policy concerns cannot trump the plain language of the Code." *Hessinger and Associates v. U.S. Trustee (In re Biggars)*, 110 F.3d 685 (9th Cir. 1997).

Of course, the public policy concerns highlighted by Mr. Rittenhouse are not completely one-sided. On the other side of a public interest in seeing that debtors receive adequate representation, lies one of the most important policies of the Bankruptcy Code: providing the honest debtor with a fresh start. To that end, if Congress wishes to amend the Bankruptcy Code to include an exception for pre-petition attorney fees it may, but it is outside the domain of this Court to do so.

There are several creative solutions to assist debtors who have difficulty raising funds for legal representation prior to a bankruptcy filing. Because this is only the second time this issue has arisen before this Court,[1] we assume that most

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[1] The other case being, *In re Baldus*, Case No. 96-84377 which was settled by agreement of the parties in an Order dated November 6,

bankruptcy practitioners know of these solutions and use them in one form or another.

The most obvious answer is to require full payment from the debtor in advance. *See Gordon v. Hines (In re Hines)*, 147 F.3d 1185, 1189 (9th Cir. 1998). Debtors commonly defer payments of other debts or borrow from family or friends. Attorneys can also lessen their exposure and the financial burden of the debtor by quantifying pre and post-petition services and requiring payment of pre-petition services up-front. Id. at 1190. Some courts allow reaffirmation of the pre-petition attorney fees. *See In re Perez*, 177 B.R. 319 (Bankr. D. Neb. 1995) There is also the option of accepting payment by third-party guarantors. Any of these methods would protect both the attorney and the debtor.

As for the argument that the Order in In re Melanie Syrjala-Mattila, Case No. 99-90513 authorized the collection of fees, the Order states: "Allan Rittenhouse shall refrain from collection efforts against Melanie Syrjala-Mattila until such time that he prevails on his appeal of the issue as to whether he is allowed to practice before the Bankruptcy Court in the Western District of Michigan."

This Order does not state that the compensation sought by Mr. Rittenhouse must be allowed, nor does it consider any defenses available to the debtor. The Order merely stays Mr. Rittenhouse from collection efforts until the outcome of the appeal is determined.

The Doctrine of Necessity is inapplicable. That Doctrine is a rule of payment that allows trustees to pay pre-petition

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debts in order to obtain continued supplies or services essential to a debtor's reorganization. The Doctrine itself is a violation of 11 U.S.C. §507 and in fact, is not authorized by any Bankruptcy Code section. When it has been applied, it allows payment in a Chapter I I case under very extraordinary circumstances of a few critical vendors who furnish the debtor with unique and vital supplies so that the debtor can operate and reorganize. *In re CoServ L.L.C.*, 273 B.R. 487, 491 (Bankr, N.D. Texas 2002).

This is not a Chapter 11 case. Mr. Rittenhouse is not a vendor or supplier to the Debtor and the Debtor does not need any further services from Mr. Rittenhouse. If Mr. Rittenhouse should refuse to perform further legal services, there are any number of other attorneys available to consult with the Debtor.

The Doctrine of Laches is designed to promote diligence and prevent enforcement of a stale claim. This Doctrine is triggered when there has been an unreasonable and inexcusable delay in bringing a claim and there has been a material prejudice to the opposing party as a result of the delay. *In re Daniels*, 270 B.R. 417 (Bankr. E.D. Mich. 2001).

Mr. Rittenhouse wrote his client a demand letter on November 19, 2002. The U.S. Trustee filed this Motion on December 17, 2002. There was no indication previous to Mr. Rittenhouse's letter that he intended to collect pre-petition legal fees from any debtor. Consequently, we find that the U.S. Trustee's Motion was neither untimely nor late and there is no prejudice suffered by Mr. Rittenhouse.

Dated: April 16, 2003

/s/ Jo Ann C. Stevenson
Honorable Jo Ann C. Stevenson
United States Bankruptcy Judge